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AUTHORITIES.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. .

AMILICAR J. TROSCLAIR, *Petitioner,*

v.

STANOLIND OIL & GAS COMPANY

and

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK,
Respondents.

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable, the Chief Justice of the United States, and to the Honorable, the Associate Justices of the Supreme Court of the United States:

This petitioner, a farmer-laborer (93, 167, 171)*, prays that under Title 28, Sec. 347 U. S. Code, a writ of certiorari be issued to the Circuit Court of Appeals of the United States for the Fifth Circuit to review an opinion and judg-

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* Unless otherwise indicated the arabic numbers used herein refer to pages of the record.

ment of that court filed February 18, 1948 (294-301), rehearing denied on March 17, 1948 (301) reversing a judgment entered May 26, 1947, by the United States District Court for the Western District of Louisiana (280-281) pursuant to a verdict of a jury that the petitioner-plaintiff have and recover from the respondents-defendants the sum of $11,000.00 (275) for personal injuries and property damages sustained when respondent Stanolind's negligently driven automobile collided with plaintiff's automobile.

STATEMENT OF THE FACTS.

The Stanolind Oil & Gas Company (hereinafter referred to as Stanolind) is a corporation organized and existing under the laws of the State of Delaware and was engaged at the time of the accident in drilling for oil and gas in Louisiana, a short distance from the corporate limits of the City of Lafayette in that State (2, 7). Stanolind had supplied on the day of the accident and previously a Mercury automobile for the use of one R. W. Wiggins who was employed by the said Company as a "tool pusher", or supervisor of drilling operation (62).

The Standard Surety & Casualty Company of New York, a corporation organized and existing under the laws of the State of New York (hereinafter referred to as Standard), was the insurance carrier on the said Mercury automobile.

On the day of the accident, Mr. Wiggins left the drilling operations at about 11:30 A. M., driving the Mercury automobile, for Lafayette. He stopped at a garage in Lafayette, referred to in the record interchangeably as the "Stute garage" (66) and the "Evangeline Hotel Garage" (68), which was owned by E. P. Stutes and his brother and under the sole management of E. P. Stutes (22). This garage was engaged in the business of storage and servicing of automobiles with gasoline, oil, tires and tire repairs, and washing them.

This suit was filed in the District Court of the United States for the Western District of Louisiana because of the diversity of the citizenship of the parties. It was tried

before a jury which brought in a verdict of $11,000.00 in favor of the plaintiff for personal injury and property damages (275). Motions for directed verdict (249-250) were overruled (251-252) and also for judgment notwithstanding the verdict (275-276). Judgment was entered in favor of the plaintiff (280-281) and the Circuit Court of Appeals for the Fifth Circuit reversed on the ground that Stutes, the manager of the garage and driver of the automobile at the time of the accident, was an independent contractor and that the trial court should have directed a verdict accordingly, failing which, it should have granted the motion of the defendants for judgment notwithstanding the verdict (301). Other questions which may have been in the case were not considered or determined by the Circuit Court of Appeals.[2]

Since the evidence with respect to whether Stutes was an agent or an independent contractor in driving the automobile to the garage consists of the uncorroborated testimony of Messrs. Wiggins and Stutes, such testimony on this point is herein set out in full as found in the record.

Wiggins-employee of Stanolind,

Cross Examination

Q. Now, Mr. Wiggins, on February 27, 1945, at approximately the hour of twelve noon, did you not pass by Mr. Stute's garage and pick him up?

A. Not at twelve o'clock.

Q. At what time?

A. Eleven-thirty.

Q. Now, in driving from Mr. Stute's garage to the point where you got out, you drove the car and Mr. Stute

Stutes—partner and operator of the garage,

Direct Examination

Q. Now, do you recall the occasion on February 27, 1945, when Mr. Wiggins came to your station with a Mercury which had been in his possession and wanted to have his car washed and greased?

A. Yes, sir.

* * * * * * * *

Q. Well, Mr. Wiggins said something to you, and as a result what did you do?

* * * * * * * *

[2] Respondents conceded in the court below that the evidence sustained the jury's finding of a lack of contributory negligence.

was seated at your right, did you not?

A .Yes, sir.

Q. Now, when you got out of the car, who moved to the driver's seat—to the wheel?

A. Mr. Stutes.

Q. Did you see him do it, and was it with your full knowledge?

A. Sure.

Q. Mr. Wiggins, did you know at the time that Mr. Stutes drove away from your home on February 27th, 1945, where Mr. Stutes was going with the car?

A. Sure, I did not know exactly, I knew he was going to wash and grease it.

Q. How did you know he was going to do that?

A. I had given him in-instructions to do it.

* * * * * * * *

Q. You told Mr. Stutes to take that Mercury and wash and grease it?

A. Yes, sir.

Q. Now, you are familiar with the fact that on that day, returning to the garage, Mr. Stutes had an accident?

A. Yes, sir, he had an accident.

* * * * * * * *

The Court: How did Stutes happen to be in the car?

A. I drove by and asked him to take me home, bring the car back and wash and grease it for me.

A. When he came by he asked me to take him home and bring the car back and lubricate and wash it for him. I always do that and I took him home and on the way back I had this accident, which occurred at Moss and Mudd.

Q. Where did he live at that time?

A. On Haig Street.

Q. Where were you headed for at that time?

A. The Evangeline Auto Hotel—my garage.

Q. Now, will you tell us, Mr. Stutes, what your practice was with respect to either taking the person—to their homes or delivering cars after you had performed work in the usual course of your business?

A. Anybody that would come to my station and they wanted me to take them home, I did it; if they did not, I did not do it; but I always take them if they ask me. It is more or less a practice of all service stations. If you keep the business you have to accommodate them.

Q. How long have you been in the automobile service station and storage business?

A. I have been in there since 1942 but in the service business since 1936.

Q. Now, since you have been in business will you

The Court: You stopped by his place, he took you home, he let you out of the car and he was going back to his place of business to wash and grease the car at that time?

A. Yes, sir.

* * * * * * * *

Mr. Dalferes:

Q. You had done that before on many occasions?

A. All my life.

Q. Did you know that during the war that stations washing and greasing cars were not permitted to furnish that service under gas rationing?

Mr. Adams: That is objected to for the reason it is a generality.

The Court: Well, maybe. But I want to know the answer. Go ahead.

The Witness:

A. Yes, sir.

* * * * * * * *

Q. Now, was not Mr. Stutes to oil and grease the car and deliver it to another employee of Standolind Oil and Gas Company who was to come for it?

A. No, sir.

Q. You were to come for it?

A. Yes, sir.

Q. What time were you to come?

A. Most any time." (66-71)

* * * * * * * *

tell us whether or not the practice you have just discussed has been your practice?

A. Yes, it has been all the time I have been in business.

Q. Are the charges for the service you perform sufficiently high to cover lost time of mechanics or yourself?

A. No extra charge at all.

Q. Are your charges for your work in general, and your storage, sufficient to cover any time that may be used in delivering a car or taking a person home as a part of your general overhead?

A. Yes, sir.

Q. What happens, for instance, if I were to walk in the Evangeline Hotel and tell the clerk I had the car outside and wanted it stored?

A. The Evangeline Hotel calls me up and I go get it and bring it to my place for storage.

Q. That is a regular part of your business?

A. Yes, sir.

Q. And I go to the clerk's desk, ready to check out, does the clerk call over and have the car sent to me?

A. If you ask for it.

Q. Is that done as an isolated thing, or the general custom?

Direct Examination

Q. Had you, or to your knowledge, other men of the Standolind Oil & Gas Company, had cars delivered to your home prior to the date of this accident?

A. Yes, sir, I had.

Q. Do you know of other men of the Standolind or do you just not have knowledge of that?

A. I just do not have knowledge of that?" (246)

* * * * * * * *

The Court:

Q. How long have you resided in Lafayette, Mr. Wiggins?

A. Since 1944. (68)

* * * * * * * *

A. It is the general custom." (227-229)

* * * * * * * *

Cross Examination

Q. So, when the clerk calls you up for a car for storage you just go that half block and bring it back?

A. You bring it around the block. You cannot back up.

Q. Now, as a matter of fact, many customers drive their cars in for storage?

A. Yes, sir.

Q. Half of them, would you say?

A. I don't know how many, but many do.

* * * * * * * *

Q. How much do you charge to wash a car, Mr. Stutes?

A. Seventy-five cents.

Q. How much to grease a car?

A. Seventy-five cents.

Q. If I bring my car to there you charge seventy-five cents to wash and seventy-five cents to grease it?

A. That is correct.

Q. What were you to charge the Stanolind Oil & Gas Company for the car you were driving if that was to be washed or greased?

A. The same price, seventy-five cents each.

* * * * * * * *

Q. The majority were brought there, were they not?

A. Yes, sir.

Q. And that was just a friend of your firm's that

you were accommodating by taking the car to them if they asked?

A. Anyone if they would come and ask me to take them home I would do it because it was part of my business.

The Court:

Q. As an accommodation?

The Witness:

A. Yes, sir." (231-233)

* * * * * * *

Q. * * * How many cars do you deliver to people at their homes?

A. It depends on the weather.

Q. The weather affects it?

A. Yes, sir, if I am going to wash and grease. If it is dry weather you have more washing and greasing than in bad weather." (238-239).

The foregoing is all of the evidence counsel for petitioner has found in the record as to whether Stutes was the agent or servant of the owner of the Mercury automobile in taking it back to the garage for washing and greasing or whether Stutes was an independent contractor in doing so. The trial court instructed the jury, in pertinent part, as follows:

Was Stutes an agent?

"4. If you find from the preponderance of the evidence that Mr. Wiggins paid no extra sum for being accompanied by Mr. Stutes to a point on Haig Street where Wiggins lived, nor any extra sum for the pur-

Was Stutes an independent contractor?

"1. If you find from the evidence that the automobile owned by Standolind Oil & Gas Company was being operated at the time of the accident by Stutes, who was manager and one of the partners of the Evangeline

pose of returning the Mercury car of Standolind Oil and Gas Company to Stutes' garages to be washed and greased, and that this was a mere accommodation to the Stanolind Oil & Gas Company, the court charges you that at that time Mr. Stutes moved over to the driver's seat to drive the Mercury car to his garage to be washed and greased, that he became the agent or servant of the defendant, Stanolind Oil & Gas Company.

5. If you find that Mr. Stutes was neglectful, and was also by the preponderance of the evidence, the agent and servant of Stanolind Oil & Gas Company, and if you find that Trosclair was free of such contributory negligence as to be a proximate cause of the accident, the negligence of Stutes is the negligence of Stanolind and Stanolind is accountable therefor." (257-258)

Auto Hotel, and was not an agent, employee or representative of the Stanolind Oil & Gas Company, I charge you that you should then bring in a verdict in favor of both the Stanolind Oil & Gas Company and the Standard Surety & Casualty Company of New York.

2. If you find from the evidence that the Evangeline Auto Hotel, owned by said Stutes and Frank Stutes, and managed by the said P. E. Stutes, customarily and as a common practice and whenever requested to do so by anyone of their customers, had one of their employees or representatives drive such customers to their homes, for the purpose of then returning the automobile to be serviced, and that such practice was a regular service furnished by the Evangeline Auto Hotel, I charge you that in driving such automobiles for the above stated purposes, the employees and representatives of the Evangeline Auto Hotel would not become employees, agents, or representatives of the owner of the automobile, but would be independent contractors for whose actions the owner of the automobile and the insurer would not be legally liable.

If, in the instant case, you find that Stutes, at the time of the accident, was driving

> the automobile as an independent contractor, rather than an employee, agent, or representative of the Stanolind Oil & Gas Company, I charge you that you should bring in a verdict in favor of the Stanolind Oil & Gas Company and the Standard Surety & Casualty Company of New York." (258-259)

The trial court further charged the jury that it was the sole and exclusive judges of the facts in the case, and of the credibility of the witnesses. (260-261)

STATUTES INVOLVED.[1]

Revised Civil Code of Louisiana.

Article 3.
"Customs result from a long series of actions constantly repeated, which have by such repetition, and by uninterrupted acquiescence, acquired the force of a tacit and common consent."

Article 2315.
"Every Act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it * * *".

Article 2320.
"Masters and employers are answerable for the damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed.
"Teachers and artisans are answerable for the damage caused by their scholars or apprentices, while under their superintendence.
"In the above cases, responsibility only attaches, when the masters or employers, teachers and artisans, might have prevented the act which caused the damage, and have not done it."

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[1] The Court does not require to be reminded that the basic law of Louisiana is the Civil Law. The terminology used therein is not always the common-law terminology.

Article 2985.
"A mandate, procuration or letter of attorney is an act by which one gives power to another to transact for him and in his name, one or several affairs."

Article 2986.
"The mandate may take place in five different manners: for the interest of the person granting it alone; *for the joint interest of both parties;* for the interest of a third person; for the interest of such third person and that of the party granting it, and finally, for the interest of a mandatory and a third person." (Italics supplied).

Article 2991.
"The procuration is gratuitous unless there has been a contrary agreement."

JURISDICTION.

The jurisdiction of this Court to grant the writ of certiorari in this case is contained in Title 28, Section 347 U. S. Code.

QUESTIONS PRESENTED.

Is the opinion of the Circuit Court of Appeals for the Fifth Circuit correct in holding that the trial court should have directed a verdict in favor of the respondents and that not having done so, the trial court should now enter judgment dismissing the complaint notwithstanding the verdict of the jury in favor of the petitioner.

REASONS FOR GRANTING THE WRIT OF CERTIORARI.

I.

The determinative issue posited by the equivocal testimony of the two witnesses having knowledge of the facts, including their credibility, was properly left by the trial court, in its instructions, to the jury. The opinion and judgment of the Circuit Court of Appeals have usurped the functions of the jury, contrary to the VIIth Amendment to the Constitution of the United States and contrary to many

decisions of this Court to the effect that issues of fact are for the exclusive determination of the jury in civil cases in the United States Courts.

Gunning v. *Cooley*, 281 U. S. 94.
Pedersen v. *Delaware, L. & W. R. Co.*, 229 U. S. 146.
Meyers v. *Pittsburgh Coal Co.*, 233 U. S. 184.
Young v. *Central Railroad Company*, 232 U. S. 602.
Slocum v. *New York Life Ins. Co.*, 228 U. S. 364
Baltimore & O. Line v. *Redman*, 295 U. S. 654.
Gasoline Products Company v. *Champlin Refining Company*, 283 U. S. 494.
Dimick v. *Schiedt*, 293 U. S. 474.
Western Atlantic R. Co. v. *Hughes*, 278 U. S. 496.
Galloway v. *United States*, 319 U. S. 372.
Best v. *District of Columbia*, 291 U. S. 411.

II.

The precise instructions given by the employee of the owner of the Mercury automobile and received by the owner of the garage, together with the veracity of either or both of the two witnesses constituted questions in this accident case peculiarly for the determination of the jury, under the appropriate instructions given by the trial court. The decision of the Circuit Court of Appeals in this case deprives the petitioner-plaintiff of his right to a trial by jury as provided in the VIIth Amendment to the Constitution of the United States.

Galloway v. *United States*, 319 U. S. 372.
Tenant v. *Peoria & P.U.R. Co.*, 321 U. S. 29.

The error of the United States Circuit Court of Appeals here is much more apparent than it was in the State court case of *Brady* v. *Southern Railroad Company*, 320 U. S. 483-485, which resulted in a five to four division in this Court.

III.

The trial court, in its instructions, gave full weight and effect to the hereinbefore quoted Louisiana Statutes, particularly Articles 3, 2986 and 2991, Louisiana Civil Code,

while the United States Circuit Court of Appeals disregarded said statutes, contrary to:

Erie R. Co. v. *Tompkins,* 304 U. S. 64, 92.

IV.

The opinion and judgment of the United States Circuit Court of Appeals for the Fifth Circuit in this case are contrary to the judgment of the United States Circuit Court of Appeals for the Third Circuit in:

Lane v. *Roth,* 195 Fed. 255, 258.

WHEREFORE, the petitioner prays that this Honorable Court issue a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to the end that the question involved may be fully presented here and justice done in the premises according to the Constitution and Laws of the United States.

Respectfully submitted,

O. R. McGUIRE,
Attorney for the Petitioner.

A. Wilmot Dalferes
Of Counsel.

IN THE

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OCTOBER TERM, 1947.

No. .

AMILCAR J. TROSCLAIR, *Petitioner,*

v.

STANOLIND OIL & GAS COMPANY

and

STANDARD SURETY & CASUALTY COMPANY,

Respondents.

BRIEF IN SUPPORT OF THE PETITION FOR CERTIORARI.

JURISDICTION.

Jurisdiction of this Court to entertain this petition and to grant the writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is contained in Title 28, Section 347, U. S. Code.

OPINIONS BELOW.

Judge Porterie's memorandum rulings denying a motion for a directed verdict and denying a motion for judgment notwithstanding the verdict of the jury in favor of petitioner are contained in the record at pages 53-54 and pages 278-280, respectively. The opinion of the Circuit Court of Appeals reversing the District Judge is in the record at

pages 294-300 and is reported as *Stanolind Oil & Gas Company et al.*, v. *Trosclair*, 165 Fed. (2) ——.

STATEMENT OF THE CASE.

The jury's verdict for personal injury and property damages in the amount of $11,000.00, for which the District Court entered judgment, arose out of an automobile accident on the streets of Lafayette, Louisiana, and because of the negligent driving of a Mercury automobile, the property of the Stanolind Oil & Gas Company and operated on its business.

The determining issue here is whether Stutes, the driver of the Mercury automobile at the time of the accident, was the servant of Stanolind Oil & Gas Company or whether he was an independent contractor in driving the said automobile from the residence of the employee of Stanolind Oil & Gas Company to the garage owned in part, managed and operated by Stutes where the automobile was to be washed and greased.

All of the available evidence on the point has been set forth in the Statement of Facts in the petition (pp. 2-9) and will not be repeated here. The Court will note certain inconsistencies in the testimony of the two defense witnesses testifying with respect to the arrangement between them for driving the automobile at the time of the accident, namely, Messrs. Stutes and Wiggins—the former being a partner in the ownership of the garage and its manager and the latter being the employee of respondent Stanolind who had been assigned the use of the Mercury automobile.

The testimony of these two witnesses on the point has been quoted from the record in parallel columns in the petition—for ease of comparison, one with the other and, also, in the case of Mr. Stutes, for comparison of some of his testimony with other parts thereof. The apparent conflicts in such testimony are referred to in more detail in the argument herein.

It seems sufficient here to state that the exact relationship of Stutes to Stanolind while driving the automobile back to the garage, as distinguished from his relationship to Stanolind while greasing and washing the automobile, is precisely the sort of question which under the VIIth Amendment to the Constitution of the United States constitutes a question of fact for a jury.

POINTS RELIED UPON.

I.

The case was properly submitted to the jury under appropriate instructions and the judgment of the court below directing the trial court to set aside its judgment and enter judgment for the respondents is in conflict with the VIIth Amendment to the Constitution of the United States and with the decisions of this Court.

II.

The driver of the automobile, property of the respondent Stanolind, causing the damage was the servant or agent of Stanolind and not an independent contractor.

III.

The Court below disregarded the applicable law of the State of Louisiana.

ARGUMENT.

1.

This case was properly submitted to a jury and its verdict is conclusive.

The Bill of Rights in the VIIth Amendment to the Constitution of the United States, provides that:

> "In all suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial

by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law."

Only two persons involved in this matter knew the facts with respect to the relationship of Stutes to Wiggins and thus to Stanolind. These two persons were defense witnesses Stutes and Wiggins and both testified in the case. According to the testimony of Mr. Wiggins, he drove by the Stutes' garage and requested him to get in the Stanolind automobile and go with him (Wiggins) to the home of Wiggins for the double purposes of driving the automobile back to the Stutes' garage and for washing and lubricating it while Wiggins, apparently, was securing his noon-day meal, and so he could return to his work with the least possible delay (72). Wiggins testified that Stutes complied with the request and that the accident happened while Stutes was enroute returning the automobile to the garage for the purpose of washing and lubricating it, thereby seriously injuring petitioner and damaging his automobile to the extent of $500 for repairs. (185)

In response to a further question as to whether Wiggins had made similar requests on prior occasion, he answered "All my life".

This answer was obviously incorrect because Stutes testified that he had been in the garage business since 1936, only, and at the particular location since 1942 (228). That is to say, at the time of the accident Stutes had been in the garage business some 12 years and at his then location some three years and Wiggins testified he had resided in Lafayette since 1944 (68). He could hardly have been making such requests all of his life, at least of Stutes. Wiggins knew that such extra service was then prohibited by war regulations (70).

Unquestionably, if Wiggins had been driving the automobile to the garage at the time of the accident, Stanolind, his employer and the owner of the machine, would have

been liable to the petitioner and the court below would not have reached the conclusion that it did reach.

Stutes testified that his charge for washing an automobile and his charge for lubricating an automobile were seventy-five cents each, regardless of whether the owner of the machine drove it into the garage for that purpose or whether Stutes or some one of his employees went to the home of the owner and drove the automobile to the garage. He was emphatic that no extra charge was made by his garage for sending to the home of an owner for an automobile and washing and lubricating it and/or sending it back after the washing and lubricating had been done.

Under questioning by the trial court, Stutes admitted that this extra service of going to an owner's home and driving an automobile to the garage for greasing and washing service was done as an "accommodation" to the owner; and, further, that the number of such extra services without charge depended upon the weather, there being more of such extra service in dry weather than in bad weather.

Stutes testified it was more or less a practice or custom of his garage to render such extra service but he was unable to give any reasonable estimate of the number of instances he rendered such extra service without extra charge as compared to the number of instances the owners drove their machines to his garage for washing and lubrication services. In any event, the charge remained the same whether the automobile was sent for by the garage or was driven in by the owner, namely, seventy-five cents for washing and seventy-five cents for lubrication.

That is to say, *Stutes' testimony is contradictory as to whether his going to the home of an owner or driver of an automobile and driving it to his garage for washing and lubrication was a "custom" or "practice" or an "accommodation". He was nevertheless certain that no extra charge was made for rendering the extra service.*

Wiggins' testimony that he had made similar requests for extra service "all of his life" most certainly could not

have been such requests to Stutes. However, if such requests had been made by Wiggins to other garage owners, it did not appear from his testimony whether he paid such other garages extra to have the extra service performed or whether the requests were performed as an accommodation to him and he knew of no other such requests (246).

All of these questions, i.e., the conflict in the testimony of defense witness Stutes, the indefiniteness of the testimony of defense witness Wiggins, and the veracity of both of them constituted questions peculiarly for a jury to determine as provided in the VIIth Amendment constituting a part of the Bill of Rights.

The trial court refused to usurp the functions of the jury in this respect by directing a verdict for the defendants. That court carefully instructed the jury as to the determination they were required to make on the whole of the evidence as to whether Stutes was an agent of Wiggins and thus of Stanolind or whether he was an independent contractor in driving the Stanolind automobile back to the garage for the purpose of washing and lubricating it.

These, we repeat, are precisely the questions which a jury should determine. In *Tennant* v. *Peoria & Pekin Union R. Company*, 321 U. S. 29, 36, the trial court had left to the jury the responsibility for determining the facts with respect to the cause of the death of decedent. The jury returned a verdict in favor of the administratrix. The Circuit Court of Appeals for the Seventh Circuit reversed the judgment and returned the case with directions to enter judgment in favor of the defendant notwithstanding the verdict. This Court reversed the Circuit Court of Appeals and held that the case was properly submitted to the jury, saying, among other things that:

> "The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives

expert instructions, and draws the ultimate conclusions as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. (Citing cases). *That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.*" (Italics ours).[3]

The Circuit Court of Appeals for the Fifth Circuit certainly reached a result in this case contrary to that reached by this Court in the cited case of *Tenant* v. *Peoria & Pekin Union R. Company,* Moreover, the factual situation here is much more favorable to the petitioner than was the situation in favor of the petitioner in the North Carolina case of *Brady* v. *Southern Railway Company,* 320 U. S. 476 where this court divided five to four. A majority of this Court concluded that without weighing the credibility of the witnesses but one reasonable conclusion could be reached as to the verdict that should be rendered.

We submit that no such a conclusion can be reached in this case in which one of the two sole witnesses knowing the pertinent facts did not testify to anything which would establish that the driver of the automobile causing the damage was an independent contractor rather than an agent or servant of Stanolind *while driving the machine.* Also, the remaining sole witness expressly testified that he drove the automobile as an "accommodation" and without any extra charge and also testified contradictorily that in driving the machine to his garage for washing and greasing he was following more or less his custom or practice when requested to do so and that the requests were more frequent on clear days than on bad weather days.

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[3] To same effect see *Seago* v. *N. Y. C. R. Co.,* 315 U. S. 781; *New York Central R. Co.* v. *Marcone,* 281 U. S. 345; *Lumbra* v. *United States,* 290 U. S. 551.

Moreover such contradiction in testimony is emphasized and pointed up by the terms of the appropriate sections of the Louisiana Civil Code, the law of the *loci delicti*, quoted in the petition herewith, that a procuration is gratuitous in Louisiana unless there has been a contrary agreement; that a procuration gives power to another to transact one or several affairs; and that it may be for the joint interest of both parties or for the interest of the person granting the same. Articles 2985, 2986 and 2991, Louisiana Civil Code.

Defense witness Stutes admitted that the driving of the automobile to his garage was a gratuitous service, no extra charge being made therefor, and it seems clear that it was either for the interest of Stanolind alone or for the joint interests of both Stanolind and Stutes. In either event, Stanolind's employee, Wiggins, had made Stutes the agent or procurator of Stanolind for the purpose of driving this automobile from the home of Wiggins to the garage of Stutes and *under Article 2315 of the Louisiana Civil Code, Stanolind is surely obliged to repair the wrong done to the petitioner by the negligent act of Stutes as determined by the jury.*

Beyond a doubt, the facts in this case are not so clear with respect to the relationship between Stutes and Wiggins, this respondent Stanolind's representative, as to bring this case within the rule justifying a trial court to instruct the jury to bring in a verdict against the petitioner and which rule was applied by a majority of the Court in the above cited case of *Brady* v. *Southern Railway Company*. Moreover, and importantly, the VIIth Amendment did not apply to the Brady case in the North Carolina courts while it does apply to this trial in the United States Courts.

II.

The driver of the Stanolind automobile at the time of the accident causing the damage was the servant or agent of Stanolind and not an independent contractor. The holding of the Court below is not only contrary to the above cited holdings of this Court but it is contrary to the holding of the Circuit Court of Appeals for the Third Circuit in Lane v. Roth, 195 Fed. 255.

The question as to whether there was a custom or common practice within the terms of Article 3 of the Louisiana Civil Code, on the part of this particular garage to send for automobiles and bring them to the said garage for servicing, so as to constitute the garage an independent contractor in driving the machines to the garage, was one of the questions of fact left by the trial court in its instructions to the jury for its determination. The jury having brought in a verdict for the petitioner on all of the evidence must be presumed to have determined in its wisdom that there was no such custom or general practice as defined in Louisiana law. *Nebel* v. *Wise*, 6 La. App. 773.

It constitutes a clear usurpation of the functions of the jury in this case, where the evidence is unclear in this respect, for the Circuit Court of Appeals to decide that there was such a general custom or practice under Louisiana law on the part of this garage and that by reason thereof the garage driver of the automobile was an independent contractor.

In the cited case of *Lane* v. *Roth*, supra, the Circuit Court of Appeals for the Third Circuit held that it was a question of fact for the jury to determine whether the driver of the truck at the time of the accident was the servant of the owner of the truck or of the Autocar Company which had worked on the truck but had failed to properly repair it and to which the truck was being returned by the driver under the instructions of an accompanying mechanic of the Autocar Company for further repairs, saying:

> "A court is not justified in taking such a question from the jury, unless the evidence in regard to it is very clear and unequivocal. Where the facts are in dispute, or more than one inference can be drawn therefrom, the question whether the servant acted within the scope of his employment, is for the jury."

The testimony of both Wiggins and Stutes on this point is not clear and the testimony of Stutes is, at least, equivocal. He received no extra pay for going to Wiggins' home and driving the machine to the garage and he did it as an accommodation. Also, he claims he made it a custom or practice to render such services when requested to do so, and gratuitously, but it was not shown that Wiggins knew of such a custom. Moreover it appears that in either event he was an agent or servant of the owner of the machine within the terms of Articles 2985 and 2991, Louisiana Civil Code.

The trial judge is a distinguished student of the Civil Law. It is apparent on the face of his instructions to the jury that he had these articles in mind when he prepared the instructions to the jury heretofore quoted in the petition (pp. 7-9) and contained in the record (257-259). The court below does not even refer to these Articles of the Louisiana Statutes in its opinion in the case nor are the said Articles referred to in the extracts from the opinions of two intermediate Louisiana courts which are, in part, quoted in the opinion of the court below.

Attention is invited to *Standard Oil Company* v. *Anderson*, 212 U. S. 215-227 and *Dalrymple* v. *Covey Motor Car Company*, 48 L. R. A. (NS) 424, 427, wherein there was also sustained the action of the trial courts in submitting to juries the questions of the relationship of the persons causing the damage and the defendants, being the same rule that was applied in *Lane* v. *Roth*, supra, and, as to negligence, in *Tennant* v. *Peoria & Pekin Union R. Company*, supra. This is the rule required by the VIIth Amendment to the United States Constitution to be applied

in the Federal Courts and universally applied where the evidence is not clear or is equivocal in character. See also *Lavendes* v. *Kurn, et al.*, 327 U. S. 645, 652-653 and *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54.

The petitioner insists that the evidence on this point is not clear and also that it is equivocal in character. Therefore, the petitioner insists that the action of the Circuit Court of Appeals constituted denial of petitioner's rights under the VIIth Amendment.

III.

The court below failed to apply the applicable law of the State of Louisiana and disregarded the same.

The basic law of the State of Louisiana with respect to *respondeat superior* is Article 2320, Louisiana Civil Code, which has been quoted in the petition (p. 9). The Supreme Court of Louisiana, with respect to this Article, stated in *May* v. *Yellow Cab Company* (1927) 164 La. 920, involving a collision between a truck and an automobile, that:

> "The Code itself provides that masters and employers are answerable for the damage occasioned by their servants and overseers in the exercise of the functions in which they are employed. Article 2320 CC."

It has long been settled Louisiana law that a defendant is not liable under this Article of the Code for the negligence of an independent contractor engaged by such defendant. See *Gallagher* v. *Southwestern Exposition Association*, 28 La. Ann. 943, with which compare the above cited case of *May* v. *Yellow Cab Company*, and *Nelson* v. *Crescent City R. Company*, 49 La. Ann. 491, *Weaver* v. *Gouldin Logging Company*, 116 La. 468, *Thompson* v. *New Orleans R. Company*, 10 La. Ann. 403, *Serio* v. *American Brewing Company*, 141 La. 290, *Matthews* v. *Otis Mfg. Company*, 142 La. 88, and *Vincent* v. *Louisiana R. etc. Company*, 140 La. 1027, holding that there is liability on the employer under said Article 2320 of the Code for the negli-

gence of an employe which injures a third party. See also *Smith* v. *Howard Crumley Co.*, 171 So. 188.

The court below disregarded the verdict of the jury under the alternate instructions of the trial court as to what constituted a servant or employee, on the one hand, and an independent contractor, on the other hand, on the part of Stutes, the part owner and manager of the garage, in driving the Stanolind Mercury automobile back to the garage for the purpose of washing and lubricating it. Whether Stutes was an agent or an independent contractor in driving the machine is a question of fact. See 42 C.J.S. page 638.

The court below chose to base its ruling on the two opinions of the intermediate Louisiana courts of appeal in *Landry* v. *McNeil Hunter Motor Company, Inc. et al.*, 11 La. App. 380, 122 So. 293, and *Pugh* v. *Hendritzy*, et al., 151 So. 668, neither of which cases appears to have involved a trial before a jury and as to which the VIIth Amendment to the United States Constitution does not apply. *Minneapolis & St. L. R. Co.* v. *Bombolis*, 241 U. S. 211; *Chesapeake & Ohio R. Company* v. *Carnahan*, 241 U. S. 241.

In any event, the report of the *Pugh* v. *Heritzy* case shows that the captain of a ship made an agreement with a garage owner to repair an automobile for $7.50, including the charge for a representative of the repairman driving home with the Captain's wife, returning the car to the garage, and then delivering the repaired machine to the Captain's home. On the drive to the garage, the garageman had an accident and it was the damage from this accident which was in controversy in the case. After reciting the facts and using the quotation from the Missouri case of *Andres* v. *Cox*, 223 Mo. App. 1139, used by the court below in its opinion, the Louisiana intermediate court of appeals stated that:

> "In the instant case the evidence is uncontradicted that the charge for the repairs included the service of the garageman in bringing plaintiff's wife home and

returning the car to be repaired. *Under the above authorities, the garageman only becomes the agent or servant of the owner of the automobile when he performs the service of delivering the automobile as an accommodation, or favor to the owner, but not where the owner is charged for this service in connection with the repairs.*

"We conclude that Johnson, the repairman, was not the agent or servant of the plaintiff, since he was charging for the service he was performing at the time of the accident in connection with the repair of the machine, and hence was an independent contractor. Therefore his negligence is not imputable to the plaintiff." (Italics ours).

Obviously *Pugh* v. *Heritzy, et al.*, supports the position of the petitioner rather than any position against him, as held by the court below. We repeat that Stutes testified that he went in the automobile to bring it back as an accommodation to Wiggins and that no extra charge whatever was made for the extra service, the charge of seventy-five cents each for washing and lubricating an automobile was made whether his garage sent for the automobile or whether it was driven into the garage by the owner to be washed and lubricated.

It is true that Stutes also testified that he had a general custom or practice of going for such automobiles and bringing them to his garage whenever he was requested to do so but he was certain that no extra charge was made therefor. He made no estimate of the number of instances when his garage sent for, or returned automobiles to their owners after service thereon and the number which were driven in and away from his garage by their respective owners.

Such being the defense evidence, the issue of whether the garageman was a servant or an independent contractor while driving the automobile had to be left to the jury in the Federal Court when demanded, on the basis of the principle stated by the Louisiana intermediate court in the case of *Landry* v. *McNeill Hunter Motor Company and Arcadia*

Rice Mills, 122 So. 293, also relied upon by the court below, wherein that court stated:

> "Our jurisprudence abounds with decisions holding that the amount of an award in damages is peculiarly within the discretion of juries and trial courts. *Surrounding local conditions and circumstances are more within their knowledge and appreciation, and their judgment is of great weight and should not be disturbed unless for serious or grave error. We see no reason, although the amount of the award in damages may appear to be inadequate, to disturb the finding in this case, and the award will remain as fixed by the trial court.*" (Italics ours)

Here the issue was whether under all of the facts and circumstances of the local conditions in Lafayette, Louisiana, including the testimony of Wiggins and Stutes, the driver Stutes was the agent or representative of Stanolind or an independent contractor while driving the Stanolind automobile to the garage for services thereon. As hereinbefore stated, that issue was peculiarly a question to be determined by the jury—as it did do under the instructions of the trial court.

This case of *Landry* v. *McNeill Hunter Motor Company and Acadia Rice Mills* does not support the conclusion reached by the court below. That case appears to have been tried by the state court without a jury. At least the report of the case does not show that it was tried before a jury and the statement in the opinion that the damages were "fixed by the trial court" seems to mean that no jury was used—as is mandatory under the VIIth Amendment when demanded in a United States Court.

The judgment in the *Landry case* was joint and in solido against both the Motor Company and the Rice Mill for $7,500.00. On appeal the judgment was reversed as to the Motor Company and affirmed as to the Rice Mill for the reason that the machine was—unknowingly to the Motor Company—equipped with a defective accelerator and this defect caused the accident while the machine was in the cus-

tody of the Motor Company and was being driven by its representative. For aught that appears in the opinion, the agreed costs of making the repairs to the automobile included the cost of the services in sending a representative of the repairman to the Rice Mill and driving the automobile back to the garage and if so, the *Landry case* is on all fours with the *Pugh case.* However, if such costs were not included in the agreed amount for making the repairs in this *Landry* case, then there is conflict between the decisions of these two Louisiana intermediate courts of appeal and there appears to be no opinion by the Supreme Court of Louisiana squarely in point. Compare *King* v. *United Commercial Travelers,* 92 U. S. Law. ed. 479, 484, No. 171 decided March 8, 1948.

But all this is immaterial in petitioner's case because the garage representative who was driving the Stanolind automobile at the time of the accident has testified that the garage made no difference in its charges for washing and lubricating regardless of whether the owner drove the automobile into the garage for such service or whether a representative of the garage went to the residence of the owner or elsewhere and drove the automobile to the garage where the washing and lubricating were accomplished. Also, Stutes testified that such extra service was an "accommodation" service.

Whether such testimony of Stutes is to be believed rather than his testimony that his charges for washing and lubricating were sufficient to absorb the cost of such extra service and that his garage followed the custom or practice, upon request, of sending a representative to the home of the automobile owner and driving an automobile to the garage is, we repeat, a question peculiarly for the determination of a jury in a Federal court under the terms of the VIIth Amendment to the Constitution of the United States. The jury made the determination in this instance to the effect that Stutes was the agent of the owner of the automobile and the court below had no power to determine otherwise,

that is, to decide which of the two conflicting versions of the testimony given by Stutes should be believed.

Conclusions similar to the one reached in this case by the jury and contrary to that reached by the court below were reached by either trial courts or juries in the following cases in other jurisdictions: *Marron* v. *Bohannon,* 104 Conn. 467; *Perkins* v. *Stead,* (1907), 23 Times L. R. 433; *Jimmo* v. *Frick,* 255 Pa. 353; *Dalrymple* v. *Covey Motor Car Co.,* 66 Oregon 533; *Holloway* v. *Schield,* 294 Mo. 521; *Janik* v. *Ford Motor Co.,* 180 Mich. 557; *Baker* v. *Homepathic Hospital,* 190 App. Div. 39, modified in 231 N. Y. 8, on a point not here involved.

The case of the petitioner and the cases just cited are distinguishable from cases where the repairman is testing out an automobile after repairs and before delivery of it to the owner, as in *Thorn* v. *Clark,* 188 App. Div. 411, 177 N. Y. S. 201, *Segler* v. *Callister,* 167 Cal. 377; and *Whalen* v. *Sheehan,* 237 Mass. 112. Or where the owner has an agreement with a garage to store his automobile and deliver it to him whenever he requested, as in *Sweetnam* v. *Snow,* 187 Mich. 414, and *Nyman* v. *Monteleone-Iberville Garage Co.,* 211 La. 375. Or where the garage has an agreement to repair and sell an automobile for the owner and an accident occurs while being driven by a garageman, as in *Stamper* v. *Jesse,* 199 Ky. 324.

In reaching the conclusion it did and in directing the trial court to enter judgment for the respondents here and appellants in that court, the court below failed to follow *Erie* v. *Tompkins,* 304 U. S. 64, 92, in that it did not apply the Louisiana law to the facts in the case and which determinative facts had been conclusively determined by the jury in accordance with the VIIth Amendment from the conflicting testimony in the case on the only issue determined by the court below.

CONCLUSION.

The petition for certiorari should be granted. The judgment of the United States Circuit Court of Appeals for the Fifth Circuit should be reversed and the judgment entered by the trial court affirmed.

Respectfully submitted,

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Attorney for Petitioner.

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of Counsel.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 744

AMILCAR J. TROSCLAIR,
Petitioner,

vs.

STANOLIND OIL & GAS COMPANY
and
STANDARD SURETY & CASUALTY COMPANY
OF NEW YORK,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

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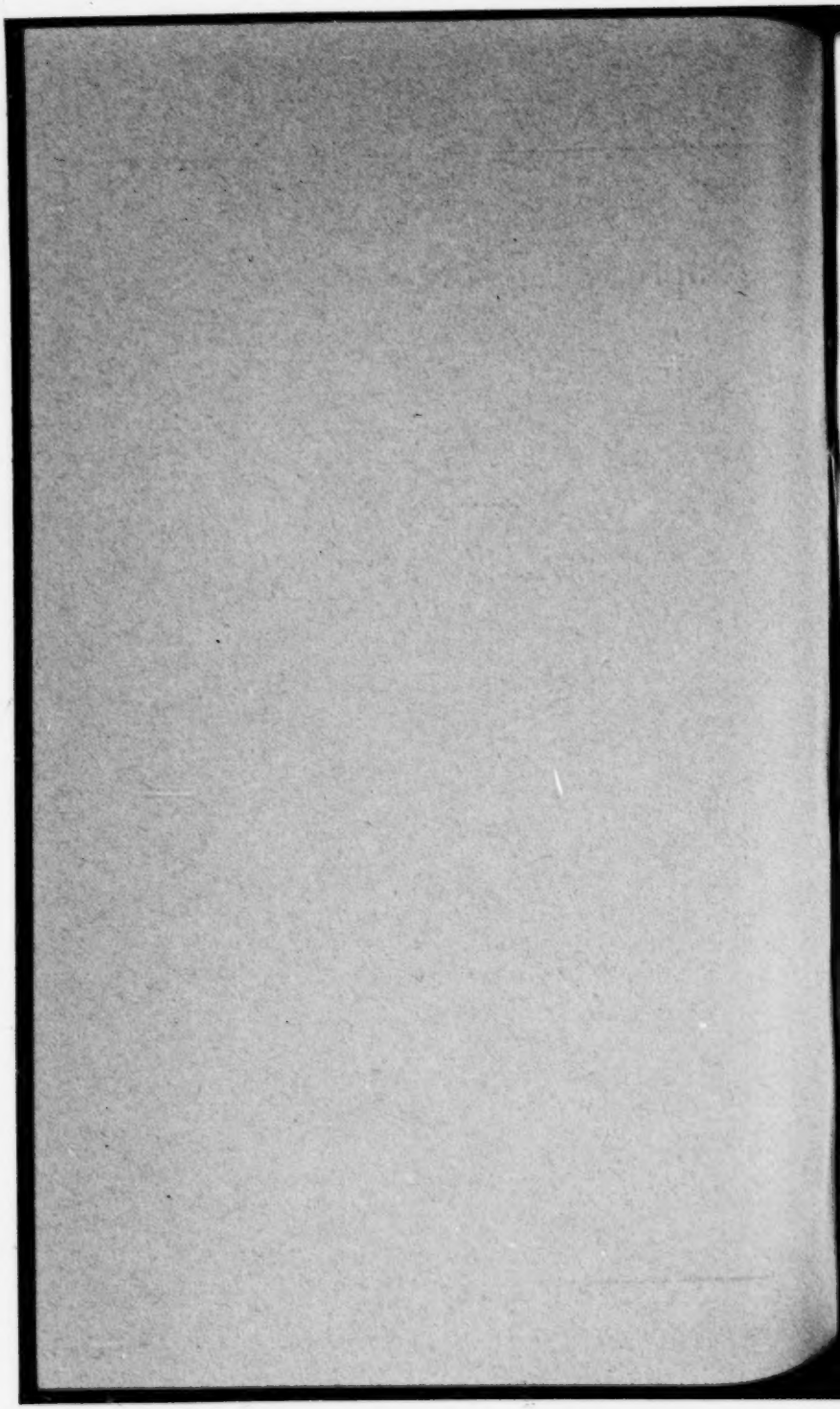

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SUMMARY

1.

There was no conflict between the testimony of R. W. Wiggins, who was employed by Standolind Oil & Gas Company as a "tool pusher" and that of P. E. Stutes, part owner and manager of the "Evangeline Hotel Garage".

2.

The testimony of P. E. Stutes is consistent in all respects and no effort was made to attack his credibility during the trial of the case. The same argument presented in the petition for certiorari, i. e., that the testimony of Stutes was contradictory, was urged before the United States Circuit Court of Appeals, Fifth Circuit, and that court held that the essential facts were established "without dispute".

3.

Under Louisiana law, where a custom is shown of making a delivery of or sending for automobiles serviced or to be serviced by the garage, that custom becomes part of the service rendered by the garage and makes the garage owner an independent contractor with respect to the service, from the time he takes possession of the car, until it is actually returned.

4.

There is no special and important reason why this case should be reviewed on writ of certiorari.

ARGUMENT

First

The petition for certiorari and brief in support thereof makes the broad and unsupported statement that there are inconsistencies in the testimony of R. W. Wiggins and P. E. Stutes. However, when we read the brief, we find no such inconsistencies pointed out.

Second

The burden of petitioner's complaint is found on Page 17 of the brief, as follows:

"That is to say, *Stutes' testimony is contra-*

dictory as to whether his going to the home of an owner or driver of an automobile and driving it to his garage for washing and lubrication was a 'custom' or 'practice' or an 'accommodation'. He was nevertheless certain that no extra charge was made for rendering the extra service." (Emphasis by Petitioner)

We find it hard to visualize a distinction between the words "custom" and "practice". Reference to any recognized dictionary will show that the word "custom" is defined as "a usage or practice"; and, similarly, the word "practice" is defined as "repeated or customary action". The word "accommodation" assuredly has a different meaning, but the record does not substantiate the statement that Stutes testified that the service performed in driving Wiggins to his home and in then returning to the garage to service the car was an "accommodation" to Wiggins. The only use of the word "accommodation" in the record was as follows:

Q. "And that was just a friend of your firm's that you were accommodating by taking the car to them if they asked?"

A. "Anyone if they would come and ask me to take them home I would do it because it was part of my business."

The Court:

Q. "As an accommodation?"

The Witness:

A. "Yes, sir." (P. 233)

Of course, the performance of any service without extra charge is an "accommodation" but in the instant suit, the evidence shows beyond dispute that all customers making a request for similar service were "accom-

modated" as a matter of custom and as a part of Stutes' business.

The same argument was advanced before the United States Circuit Court of Appeals, Fifth Circuit, which court said:

> "It is without dispute that the Evangeline Auto Hotel, as a part of its business, customarily sent for cars to be serviced at its garage and delivered them after servicing; and that the garage's regular charges were sufficient to take care of this service as a part of its general overhead. These facts being established, it was error to overrule the motion by both defendants for a directed verdict and to overrule the subsequent motions for judgment notwithstanding the verdict."
>
> (*Stanolind Oil & Gas Company, et al vs. Trosclair,* 166 Fed. (2d) 229.)

Third

The brief in support of the petition for certiorari gratuitously states that the court below failed to apply the applicable law of the State of Louisiana and disregarded the same. To the contrary, it will be found that the court below predicated its decision upon the cases of *Landry v. McNeil Hunter Motor Company,* 11 La. App. 380, 122 So. 293; *Pugh v. Henritzy, et al,* 151 So. 668; and *Andres v. Cox,* 223 Mo. App. 1139, 23 S.W. (2d) 1066, 1070, (this latter case having been quoted with approval in the *Pugh* case.)

Counsel for petitioner glosses over the case of *Landry v. McNeil Hunter Motor Company, supra,* by stating that the case was not tried before a jury and it would not support the conclusion reached by the court below. However, the court below was of an entirely

different opinion as evidenced by the following excerpt from its decision:

> "The Court of Appeal, First Circuit, of the State of Louisiana had before it in *Landry v. McNeil Hunter Motor Co., Inc. et al*, 11 La. App. 380, 122 So. 293, a case almost identical with the case at bar. The facts and the law applicable thereto are set out in the body of the court's opinion in these words:
>
> > "It appears that A. L. Daboval, a rice grader and an employee of the Acadia Rice Mills, drove a Ford Sedan, the property of the Rice Mills, to the McNeil Hunter Garage, in order to have broken glasses inclosing the top of the Ford Sedan replaced with new whole glasses. That was the only repair which was indicated as the purpose of bringing the Ford to the garage. Daboval spoke to Hoffpauir, foreman of the garage, who told him that the job would require an hour or two. A heavy rain was falling at the time, and at the request of Daboval, Hoffpauir directed Archie Morgan, a mechanic in the employ of the repair shop, to go with Daboval to the rice mill, some 8 to 10 blocks distant, and bring back the Ford to make the repairs requested. Morgan got into the automobile, sat next to Daboval and when they reached the rice mill, Daboval got out and Morgan moved over into the driver's seat and started back to the garage. * * * (On the way back, the mechanic ran the car into and injured Landry.)
>
> > * * * * *
>
> > "At the time of the accident the Ford sedan was in the possession of and under the control of the McNeil Hunter Motor Company. Morgan accompanied Daboval to the rice mill, not as agent of the rice mill, but

> as an employee of the motor company, upon the instructions of Hoffpauir, foreman of the shop. Of this we believe there is not question or doubt. *It is shown that it was customary for the motor company to accept delivery of automobiles to be repaired, wherever the customer might request, in the town of Rayne, and that return delivery from the motor company to the owner of the automobile was, upon request, made in the same manner, without reservation of nonliability in case of accident.* It therefore seems to follow as a consequence that when Daboval got out of the automobile at the rice mill, delivery to Morgan was delivery to the motor company." (Emphasis added by court)

In respect to the case of *Pugh v. Henritzy, supra,* counsel for petitioner refers to the fact that the charge of $7.50 for making repairs to the automobile included the service of the garage man in bringing plaintiff's wife home and returning the car to be repaired. We particularly point out that no reference was made to the payment of any "extra sum", but merely to the fact that the charge for the repairs included the service of the garage man in bringing the owner's wife home and returning the car to be repaired. The identical same set of facts exists in the present case by the uncontradicted testimony of Stutes that his charges were adjusted to include the service of himself and his employees in bringing the owners of the cars to their homes and then returning the cars to the garage. The court cited with approval the case of *Andres v. Cox, supra,* wherein we find the following language:

> " * * * In the absence of a contract or *custom,* the bailee of a car, for the purpose of making repairs upon it, is under no obligation to

> make delivery of the car to the owner, either at his place of business or his residence. *Marron v. Bohannan*, 104 Conn. 467, loc. cit. 470, 133 A. 667, 46 A.L.R. 838. *In the present case no custom of making such delivery was shown. So far as the* (fol. 302) *evidence shows, Redel never delivered cars upon which he had made repairs to the owners at their homes of places of business, or at any other place from his repair shop,* except that on a number of occasions he delivered the appellant's car to her at her home, and this was done as a mere accommodation or favor, and only as suited his convenience, and without any obligation to do so." (Emphasis by court)

After giving consideration to all applicable law of the State of Louisiana, the court below said:

> "Under Louisiana law, as reflected by these cases, where a custom is shown of making delivery of or sending for automobiles serviced or to be serviced by the garage, that custom becomes part of the service rendered by the garage and makes the garage owner an independent contractor with respect to the service, from the time he takes possession of the car until its actual return. This is in accordance with the general rule. See 5 Blashfield, Cyclopedia of (fol. 303) Automobile Law and Practice, § 2966, p. 103; and cases cited in annotations appearing in 46 A.L.R. 840."

We suggest that the court below gave thorough consideration to the case in its entirety and assuredly applied the Louisiana law as reflected in its jurisprudence.

Fourth

In conclusion, we refer to the Rules of the Supreme Court, Rule 38, Section 5 (b). We suggest that the instant case does not present any special or important

reason why a writ of certiorari should be granted. We are concerned with an ordinary damage suit arising out of an intersectional automobile accident and the only person to whom the case is important is petitioner. The question of local law was correctly resolved by the court below, but in any event, we cannot conceive that the question was of particular significance or importance to the jurisprudence of Louisiana or of the United States.

Respectfully submitted,

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ST. CLAIR ADAMS, JR.,
Of Counsel.